Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1995

Frank A. Greco,
Petitioner,
v.
Mary C. Fitzpatrick, John J. Scully,
the Probate & Family Court, and
the Commonwealth of Massachusetts,
Respondents.

On Petition for Writ Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTIONS PRESENTED

- This action arises under 42 U.S.C. §§ 1983, 1985 and 1986 and seeks monetary compensation for harm done because of the illegal destruction of a court record. It was dismissed under Rule 12, Fed. R. Civ. P., because the complaint is "inextricably intertwined" with state court judgments. The defendants made no showing that the relief sought is intertwined with state court judgments, nor were they required to. Does this dismissal conflict with the ruling of this Court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 (1988) by extending *de facto* the doctrine of judicial immunity to administrative acts such as the destruction of a court record?

- Must a claim allege a "class-based, invidiously discriminatory animus" in order to sustain a cause of action under 42 U.S.C. § 1985(2)?

TABLE OF AUTHORITIES

42 U.S.C. §1985 9,10

Forrester v. White,
484 U.S. 219, 108 S.Ct. 538 (1988) 7-9,13

Greco v. Suffolk Division of the Probate and Family Court Department,
418 Mass. 153, 635 N.E. 2d 243 (Mass. 1994) 10,12

In re Lucey,
331 Mass. 292, 118 N.E. 2d 762 (1954) 11

TABLE OF CONTENTS

QUESTIONS PRESENTED
TABLE OF AUTHORITIES
JURISDICTION 1
PRELIMINARY STATEMENT 1
STATEMENT OF THE CASE 1
STATEMENT OF FACTS 4
ARGUMENT 5

I. The U.S. Court of Appeals for the First Circuit has extended judicial immunity to administrative acts, contrary to the decision of this Court in *Forrester v. White* 7

II. A complaint under 42 U.S.C. § 1985(2) need not allege a "class-based, invidiously discriminatory animus" in order to sustain a cause of action 9

III. The circumstances surrounding these incidents support the granting of a writ of certiorari 10

CONCLUSIONS 14

APPENDIX

1. 11/10/94 Order and Memorandum of District Court 1

2. 6/23/95 Rescript of U.S. Court of Appeals (1st Cir.) 7

3. 8/15/95 Denial of Petition for Rehearing 10

JURISDICTION

The mandate of the U.S. Court of Appeals for the First Circuit issued on August 23, 1995. On October 20, 1995 Justice Souter extended the time within which to file a petition for a writ of certiorari to January 12, 1996. Jurisdiction is conferred by 28 U.S.C. § 1254.

PRELIMINARY STATEMENT

Writing this petition presented two problems of style and I hope my solutions to them do not interfere with the presentation. The first problem is whether I should write as myself or as my attorney, speaking of myself in the third person. I suppose my solution has already been declared; I decided to write as myself. The second problem is that the set of facts relevant to the questions presented is somewhat different from that needed to argue that the importance of this case goes beyond a story told in the first person singular. I have limitted the STATEMENT OF FACTS to those relevant to the questions presented. Where other facts are needed in argument to show the significance of certain events, I have introduced them in that section. In lieu of submitting an affidavit, I have sworn to the truthfulness of all facts used in argument.

STATEMENT OF THE CASE

In September 1994 I filed a complaint in the federal district court for Massachusetts against the defendants. Mary C. Fitzpatrick is the Chief Justice of the Probate and Family Court Department of the Commonwealth of Massachusetts. She is also First Justice of the Suffolk Division of the probate court and in that capacity has direct administrative responsibility for the incidents described in

the complaint. Until recently Mary Fitzpatrick had also been the chairman of the Commission on Judicial Conduct, the state agency charged with investigating complaints against judges. John J. Scully is an assistant register of probate in the Suffolk Division. The complaint divided into two parts. The first part arose under 42 U.S.C. §§ 1983, 1985, and 1986 and sought money damages against Mary Fitzpatrick and John Scully. These two defendants worked together with others in the probate court to destroy illegally a court record to which I was entitled as a matter of law, thereby depriving me of due process and resulting in harm. These facts formed the basis for the claims under 42 U.S.C §§ 1983 and 1985 (Counts One through Three). Furthermore, Judge Fitzpatrick, Assistant Register Scully and others in the probate court knew of the impending destruction of the court record, were in a position to prevent it, and failed to act. These facts formed the basis for the claim under 42 U.S.C. § 1986 (Count Four). The second part of the complaint sought injunctive relief against the Commonwealth of Massachusetts for violations of the Fourteenth and Sixth Amendments to the U.S. Constitution. These included systematic violations of court rules and the failure to provide an impartial trier of fact (Counts Five and Six) and forcing me to be tried for criminal contempt without the benefit of counsel (Count Seven). The complaint dealt with several instances in which violations of constitutional rights occurred. The relief sought was not a reversal of the court orders mentioned in the incidents but rather injunctive relief to solve the systematic problems in Massachusetts that permit such instances to happen. Part of the systematic problem in Massachusetts

is that the Commission on Judicial Conduct fails to obey the statutes that govern it.

Jurisdiction was conferred upon the federal courts because of the federal nature of the questions involved and by 28 U.S.C. §§ 1331 and 1343.

At the time of filing I also asked for a preliminary injunction against the defendants enjoining them from destroying any other relevant records. This motion was denied (Stearns, D.J.). The Attorney General of Massachusetts entered an appearance for the defendants. He moved for dismissal under Rule 12, Fed. R. Civ. P., and this motion was allowed. (Stearns, D.J., Appendix, pp 1-6). The district court stated that I was asking it to reverse state court judgments and that it lacked jurisdiction to do so. I appealed to the U.S. Court of Appeals for the First Circuit and stressed that nowhere in the complaint do I ask for the reversal of a state court judgment. The Court of Appeals wrote that if an action is "inextricably intertwined" with a state court judgment that lower federal courts lack jurisdiction even if the relief sought is not a reversal of the judgment (Appendix, pp 7-9). It also ruled that I could not bring a cause of action under 42 U.S.C. § 1985 unless I belonged to a protected class. I petitioned for a rehearing, arguing that, since the dismissal was under Rule 12, the defendants must show that compensating me for harm done was inextricably intertwined with a state court judgment and that no such showing had been made. Furthermore, the plain language of 42 U.S.C. § 1985 did not require that a plaintiff belong to a protected class. My petition for rehearing was denied on August 15, 1995 (Appendix, p.10).

STATEMENT OF FACTS

On September 1, 1989 a hearing was held in the Suffolk Division of the Probate & Family Court Department of the Commonwealth of Massachusetts. Judge Mary C. Fitzpatrick presided over the hearing; John Scully, an assistant register of probate, functioned as the clerk. I was not notified of the hearing and was not present. The hearing was tape-recorded and, pursuant to court rules (Supplemental Rule 201), I was entitled to a cassette copy of the tape. Although I requested a copy of the tape, the probate court never provided me with one. My efforts to obtain a copy are summarized in *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153, 635 N.E. 2d 243 (Mass. 1994). The relief sought in that action was an order directing the probate court to furnish me with a copy of the tape. In the course of that action Defendant Scully stated that the tape could not be produced because it had been destroyed. The Supreme Judicial Court for the Commonwealth of Massachusetts wrote that "we note that the destruction of the recording after the plaintiff had made it clear that he wanted a copy and while the matter recorded was pending and subject to appellate review, appears to violate the letter and spirit of rule 201(4)." *Greco*, *supra*, n. 9 at 157.

Mary Fitzpatrick is First Justice of the Suffolk Division of the Probate and Family Court, a position she held at the time of the 1989 hearing. As such she has administrative responsibility for the Suffolk Division. Mary Fitzpatrick is also Chief Justice of the Probate and Family Court Department and as such has administrative responsibility for the entire department.

I do not know who actually destroyed the tape or when it was destroyed. I had informed both Mr. Scully and Judge Fitzpatrick that I wanted a copy of the tape. I believe that both Mr. Scully and Judge Fitzpatrick had the authority to prevent the destruction of the tape and knew of its impending destruction. Based on statements made by Mr. Scully in my presence, I believe that Mary Fitzpatrick ordered that the tape be destroyed.

ARGUMENT

If the probate court were a school district, it would be in federal receivership. An analogy to a prison would perhaps be more cogent because litigants are akin to prisoners on parole, given the extent to which the court controls their lives. But decisions in probate courts are made by judges, not ordinary state officials, and the doctrine of judicial immunity has kept the federal courts at arms length. Both the district court and the appeals court refer to judicial immunity but cite other reasons for dismissing the complaint under Rule 12.

The district court wrote that "Greco's principal complaint, that his procedural due process rights have been violated because of his inability to obtain a copy of the disputed tape, was heard by the Single Justice and, upon appeal, by the full Supreme Judicial Court" (Appendix, p. 3). The action referred to was brought under M.G.L. c. 211, §3 and was to order the probate court to produce a copy of the tape; the probate court did not admit that the tape was destroyed until the filing of briefs on appeal. An action brought under M.G.L. c. 211, §3 could not have compensated me for the harm done by the destruction of the tape and

Judge Stearns should have been aware of this since he only recently left the Massachusetts's bench for the federal.

The appeals court retreats somewhat from the arguments of the district court. It is ironic that the appeals court states that my "remedy is to appeal within the state court system and then, if necessary, to petition the United States Supreme Court for a writ of certiorari" (Appendix, p. 8). How does one appeal a destroyed tape? How does one assemble a record for appeal when the trial court illegally withholds and then destroys the record? The injunctive relief sought, e.g., that the state take steps to prevent destruction of court records or that certain rules be posted so that litigants will be aware when the clerks are not following them, could not be obtained by appeal.

The defendants never filed an answer to the complaint and so issues of fact could not be joined. That is the reason why there is so much discrepancy between my statements and those of the courts. The complaint dismissed by the district and appeals courts is not my complaint. Another reason for this discrepancy is that under Rule 12 the burden of proof was upon the defendants and yet they made no showing that granting the relief sought would infringe upon a state court judgment. By failing to require the defendants to make such a showing, the appeals court treats all behavior in state courts as immune from review.

I. The U.S. Court of Appeals for the First Circuit has extended judicial immunity to administrative acts, contrary to the decision of this Court in *Forrester v. White*.

The court of appeals confirms that I do not seek to reverse any state court judgment in this action (Appendix, p. 8). Instead, the court of appeals merely states that the action is "inextricably intertwined" with state court judgments (Appendix, p. 8). In order to prevail on a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (6), the burden was upon the defendants to show that compensating me for the harm done by the destruction of the tape was "inextricably intertwined" with a state court judgment. No such showing was made. Neither the court of appeals nor the defendants could identify a single state court judgment whose scope would be infringed upon by compensating me for the destruction of the tape. Because no showing was made to connect my complaint with a state court judgment, it follows that the appeals court considers the destruction of the tape to be "inextricably intertwined" with state court judgments without more from the defendants. This implicit finding of the Court of Appeals is plainly erroneous. The handling of court records is an administrative function of the courts and ruling that federal courts lack jurisdiction to hear complaints about the handling of records by state courts *de facto* extends the doctrine of judicial immunity to administrative acts.

This extension of judicial immunity to administrative acts is contrary to the rulings of this court in *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 (1988).

Aware of the salutary effects that the threat of liability can have, however, as well as the undeniable tension between official immunities and the ideal of the rule of law, this Court has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court. Running through our cases, with fair consistency, is a "functional" approach to immunity questions other than those that have been decided by express constitutional or statutory enactment. Under that approach, we examine the nature of the functions with which a particular official or class of officials has been lawfully entrusted, and we seek to evaluate the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions.(at 223-224)... Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, immunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches. (emphasis in the original)

This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases,

> however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform....
>
> Administrative decisions, even though they may be essential to the very functioning of the courts, have not similarly been regarded as judicial acts. (at 227-228)

The probate court had no discretion as to whether or not to provide a copy of the tape; production of the tape could not have been opposed by the other party. The failure to produce the tape is not in any way a judicial act and compensating me for the destruction of the tape will not infringe upon any state court judgment.

II. A complaint under 42 U.S.C. § 1985(2) need not allege a "class-based, invidiously discriminatory animus" in order to sustain a cause of action.

The appeals court has ruled that "divorced fathers seeking custody of their children do not form a protected class under § 1985" (Appendix, p. 9). 42 U.S.C § 1985(2) reads as follows:

> [I]f two or more persons conspire for the purpose of impeding, hindering, obstructing or defeating, in any manner, the due course of Justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to

injure him or his property for lawfully enforcing, or attempting to enforce, *the right of any person*, or class of persons, to the equal protection of the laws; ... *the party* so injured or deprived may have an action for the recovery of damages by such injury or deprivation, against any one or more of the conspirators (emphasis added).

The ruling of the Court of Appeals is plainly erroneous because 42 U.S.C. § 1985 does not define any notion of a "protected class" and moreover specifically states that the conspiracy may involve the right of any person. Mary Fitzpatrick and John Scully worked together to prevent my obtaining a copy of the tape, to which I was entitled as a matter of law. *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153 at 154, 635 N.E. 2d 243 (Mass. 1994). These facts support a cause of action against them under 42 U.S.C. § 1985(2).

I do not know who actually destroyed the tape. Certainly everyone in the Suffolk Division of the probate court knew that I wanted it; I personally informed the defendants that I wanted a copy of the tape. Anyone who knew of the impending destruction of the tape, could have prevented it and yet failed to act is liable under 42 U.S.C. § 1986. The appeals court does not address this issue at all.

III. The circumstances surrounding these incidents support the granting of a writ of certiorari.

I believe that my complaint correctly states a cause of action against the defendants but I am aware that if one

views the world through the prism of civil rights that the landscape quickly becomes crowded with violations. Is this matter *de minimis*? I have not discussed my damages because the complaint was dismissed under Rule 12, Fed. R. Civ. P., and damages are not an issue at this point. However, the circumstances surrounding this incident show that it is not a minor infraction.

Massachusetts law limits the type of order that can issue from an *ex parte* hearing such as the one in September 1989 and specifies how it shall be served. M.G.L. c. 208, § 34B and § 34C. Furthermore, the Supreme Judicial Court has ordered that certain preprinted forms be used; for the statutes referred to the forms are Form CJ-D 421 and CJ-D 212 respectively. The probate court does not have the authority to change the preprinted forms. *In re Lucey*, 331 Mass. 292, 118 N.E. 2d 762 (1954). It is a matter of record that the defendants not only violated the two statutes cited but also avoided the required forms which would have forced their compliance. Hence their intent in withholding the tape is clear: they wanted to cover-up statements made concerning their violations of statute that occurred during the hearing. I have seen similar orders on record at the Boston police headquarters and, while my examination was not exhaustive, about half the orders I saw were not written on the proper form, implying that statutes are routinely violated. This is not an isolated problem.

In attempting to obtain a copy of the tape, I contacted many law firms in Boston, both large and small, and asked for legal representation in my pursuit. They all said the same thing:"You're right. You're entitled to the tape.

However, it's not in the best interest of our firm to represent you in this. Good luck." Several of the attorneys I spoke with initially wanted to help but changed their minds after discussing the matter with their partners. They seemed disappointed; they seemed afraid. I asked help from the Civil Liberties Union of Massachusetts and was also turned down. In this context the ruling of the Court of Appeals emerges as something of an understatement: in Massachusetts not only do I fail to belong to a legally protected class, I also fail to belong to a legally represented class.

In Massachusetts the Commission on Judicial Conduct is charged with investigating complaints against judges. A screener receives the initial report and decides whether the allegations constitute potential misconduct. Only then is the report considered a "complaint" and investigated. By statute, M.G.L. c. 211C, § 2, ¶ 5(e), any violation of the code of judicial conduct is to be considered misconduct. Canon 2(A) requires a judge to obey the law. However, when I reported the violations of statute by Judge Fitzpatrick to the commission, my report was not deemed a complaint and was not investigated. Until recently, Judge Fitzpatrick was the chairman of the Commission on Judicial Conduct.

Neither Judge Fitzpatrick nor John Scully has ever contested the fact that there were at least two violations of statute in the September 1989 hearing. Furthermore, the Supreme Judicial Court has stated that the destruction of the tape was in violation of court rules. *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153 n. 9 at 157, 635 N.E. 2d 243 (Mass. 1994). It is

therefore unconscionable that the Attorney General of Massachusetts should be representing the defendants in this matter.

To whom does one turn when judges violate statutes? To the Commission on Judicial Conduct, a commission formerly run by Judge Fitzpatrick that does not consider violating a statute as judicial misconduct, thereby violating a statute itself? To the Attorney General, who is charged with enforcing statutes but who is representing the judge? To the federal courts, who turn a deaf ear unless one belongs to a protected class? I can only turn to this Court. What is at stake here is far more important than a destroyed tape. The fear expressed by attorneys in declining to represent me bespeaks a legal culture that is dangerously askew. It is a culture that needs, in the words of this Court, "...the salutary effects that the threat of liability can have." *Forrester v. White*, 484 U.S. 219 at 223, 108 S.Ct. 538 (1988).

CONCLUSIONS

In light of the foregoing, I respectfully request that this Court reverse the decision of the U.S. Court of Appeals for the First Circuit and remand the case to district court for further proceedings.

Respectfully submitted,

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I hereby swear to the truthfulness of all statements of fact made herein under the pains and penalties of perjury, this the 9th day of January 1996.

APPENDIX

1. 11/10/94 Order and Memorandum of District Court 1

2. 6/23/95 Rescript of U.S. Court of Appeals (1st Cir.) 7

3. 8/15/95 Denial of Petition for Rehearing 10

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NUMBER 94-11906-RGS

FRANK A. GRECO

v.

MARY C. FITZPATRICK, JOHN J. SCULLY, PROBATE AND FAMILY COURT, and COMMONWEALTH OF MASSACHUSETTS

MEMORANDUM ORDER

November 10, 1994

STEARNS, D.J.

The plaintiff, Frank A. Greco ("Greco"), acting pro se, brought this Complaint under 42 U.S.C. §§1983,1985, and 1986, seeking compensation for alleged economic harm he suffered as a result of a divorce proceeding in the Massachusetts Probate and Family Court. Greco alleges that the defendants, the Chief Justice of the Probate Court, an Assistant Register of Probate, the Probate Court itself, and the Commonwealth of Massachusetts, denied him due process and equal protection of the law in violation of the Fourteenth Amendment, and refused to appoint him counsel in violation of the Sixth Amendment. Because of the preclusive effect of Greco's litigation of these same claims in the courts of the Commonwealth, they may not be relitigated in a federal forum and therefore will be DISMISSED.

FACTS

In divorce proceedings brought against Greco, the probate Judge, on application by Greco's former wife, issued an *ex parte* temporary restraining order. Greco sought to obtain a copy of the tape recording of the *ex parte* hearing (which he was entitled to pursuant to Rule 201 of the Supplemental Rules of the Probate Court), but was rebuffed at every turn by the Probate Clerk. Greco unsuccesfully sought relief from a Single Justice pursuant to G.L. c. 211, §3. His appeal of the Single Justice's ruling was decided adversely by the full Supreme Judicial Court in *Greco v. Suffolk Division of the Probate and Family Court Department*, 418 Mass. 153 (1994). The actions about which Greco now complains are part of this same dispute.[1]

DISCUSSION

42 U.S.C. §1983 creates a cause of action against "[e]very person who, under color of [law]...of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution." While §1983 enables litigants to redress a wide array of constitutional harms, it does not expand the *jurisdiction* of the federal courts to hear such claims. Federal courts are courts of limited jurisdiction whose power to hear §1983 cases arises under 28 U.S.C. §1331, the general federal question jurisdiction statute.

The fact that federal courts have jurisdiction to hear §1983 claims does not mean that jurisdiciton exists in every case. "The most important exception is that federal courts

do not have jurisdiction pursuant to §1983 to review the judgments and decisions of state courts." Chemerinsky, *Federal Jurisdiction*, §8.1 at 370-371 (1989), citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). This fundamental precept of federalism is not diminished by Greco's assertion that rather than a reversal of the state court judgment, he is seeking "compensation" for the abridgment of his rights by the state court. See *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984). ("[It is a] well settled rule that a plaintiff may not seek a reversal of a state court judgment simply by casting his complaint in the form of a civil rights action").[2] The heart of the *Rooker* doctrine is the admonition that lower federal courts may never sit in direct review of the decisions of state courts, even when a case raises a federal question. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970). The power to review state court decisions is vested exclusively in the Supreme Court of the United States by way of a writ of certiorari, and then only after the highest court of the state has made a final determination of a federal question. *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Murdock v. City of Memphis*, 87 U.S. 590 (1874).

Greco's principal complaint, that his procedural due process rights have been violated because of his inability to obtain a copy of the disputed tape, was heard by the Single Justice and, upon appeal, by the full Supreme Judicial Court. *Greco v. Probate Court, supra*. The Supreme Judicial Court acknowledged that it was "troubled by the handling of

this case by the trial court," Id. at 157, and that it "agree[d] with the plaintiff that, as a party to the proceedings, he should have received a copy of the tape...as a matter of law." Id. at 156. However, the Supreme Judicial Court declined to exercise its superintendence power, explaining that exceptional "[r]elief need not be granted where an alternative means of redress is available." Id. at 154.[3] The Court similarly refused Greco's demand that it order an investigation of those ostensibly responsible for the disappearance of the tape.

> The plaintiff also seeks to compel an investigation into the alleged misconduct of an assistant register of probate, the judge who heard the motion, and his former wife's attorney. Nothing in the record substantiates the plaintiff's allegations of misconduct. If the plaintiff desires to pursue this aspect of the matter, he may file complaints with the Committee on Professional Responsibility for the Clerks of the Courts in accordance with S.J.C. Rule 3:13...and Code of Professional Responsibility for Clerks of the Courts, S.J.C. Rule 3:12 (1994); with the Commission on Judicial Conduct in accordance with G.L. c. 211C, §5 (1992 ed.). and Rule 6(A) of the Rules of the Commission on Judicial Conduct (1994); and, as to the attorney, with the Board of Bar Overseers, pursuant to S.J.C. Rule 4:01, §1(2),...and the Rules of the Board of Bar Overseers §§2.1-2.2. Id. at 154, n.2.

Although the Supreme Judicial Court's opinion disposes of Greco's federal claims, I recognize that the plaintiff in

this case might wonder if, had he not the disadvantage of being *pro se*, he might have been able to fashion a complaint embodying a federal claim not addressed in *Greco* that could have saved him from the reach of the *Rooker* doctrine. The rule, however, is settled that plaintiffs are barred from litigating federal questions in federal court that should have been litigated in conjunction with a state court proceeding. 28 U.S.C. §1738; *Allen v. McCurry*, 449 U.S. 90 (1980). See also *Manego v. Orleans Board of Trade*, 773 F.2d 1, 5 (1st Cir. 1985). Because I conclude that this court has no jurisdiction to hear Greco's case, I need not consider the Commonwealth's considerable arguments regarding the immunity of the state and its judicial officers from claims for monetary damages.

ORDER

For the foregoing reasons, the defendants' motion to dismiss is ALLOWED.

SO ORDERED,

s/Richard G. Stearns

UNITED STATES DISTRICT JUDGE

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[1] They include: the validity of the restraining order; the failure to provide the tape of the ex parte hearing; the failure to discipline the Probate Judge and the Probate Clerk for their actions in relation to the tape and temporary restraining order; the failure to obey the Soldiers' and Sailors' Civil Relief Act; the failure to provide Greco with Counsel; the improper adjudication of wage assignments

and child support payments; the issuance of an improper summons; and the improper cancelling of a hearing on a preliminary injunction.

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[2] As the First Circuit has explained: The holdings of *Allen* [*v. McCurty*] and *Migra* [*v. Warren City School District Board of Education*] conform to the rule long followed in this Circuit that "the Civil Rights Act is not a vehicle for collateral attack upon final state court judgments, and that a writ of certiorari to the United States Supreme Court is the only method by which such a decision may be reviewed." *Arecibo Radio Corporation v. Commonwealth of Puerto Rico*, F.2d 589, 592 (1st Cir. 1987)(citations omitted).

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[3] The Court went on to explain that the alternative remedies available to Greco, which involved referring the problem to the Chief Justice of the Probate Court (who at the relevant time was not the same judge who had presided at the original hearing), and by petitioning another Probate Judge whose order that the tape be produced was never complied with.

United States Court of Appeals
For the First Circuit
No. 94-2248

Frank A. Greco, M.D., Ph.D.,
Plaintiff, Appellant,
v.
Mary C. Fitzpatrick, et al.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before
Torruella, Chief Judge,
Selya and Boudin, Circuit Judges

Frank A. Greco, M.D., Ph.D., on brief pro se
Scott Harshbarger, Attorney General, and
Rebecca P. McIntyre, Assistant Attorney General,
on brief for appellees.

June 23, 1995

Per Curiam. We affirm the judgment substantially for the reasons recited in the district court's decision of November 10, 1994, adding only the following comments.

In objecting to the district court's reliance on the *Rooker-Feldman* doctrine, see *Rooker v. Fidelity Trust Co.*,

263 U.S. 413, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), plaintiff argues that he is not seeking to overturn any state court judgment per se and that , in fact, many of the challenges here advanced to the probate court proceedings were never pursued in the state court system. The *Rooker-Feldman* doctrine recognizes that a federal district court lacks appellate jurisdiction to review a state court judgment. See, e.g., *id.* at 482-86; *Gash Assocs. v. Village of Rosemont, Ill.*, 995 F. 2d 726, 728-29 (7th Cir. 1993); *Lancellotti v. Fay*, 909 F.2d 15, 17 (1st Cir. 1990). What plaintiff fails to recognize is that such "impermissible appellate review may occur when a district court is asked to entertain a claim that was not even argued in the state court but is 'inextricably intertwined' with the state court judgment." *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993) (quoting *Feldman*, 460 U.S. at 483 n. 16), *cert. denied*, 114 S. Ct. 694 (1994); *accord*, *e.g.*, *Keene Corp. v. Cass*, 908 F.2d 293, 296-97 (8th Cir. 1990). The multiple claims here presented--alleging violations of such matters as due process, equal protection, and the right to counsel-- are sufficiently "intertwined" with the probate court proceedings so as to fall within the *Rooker-Feldman* doctrine's embrace. Plaintiff's remedy is to appeal within the state court system and then, if necessary, to petition the United States Supreme Court for a writ of certiorari.

We add that plaintiff's various allegations would falter even if the merits were to be considered. To list just some of the infirmities affecting his complaint: In order to state a cause of action under the second clause of 42 U.S.C §1985(2), plaintiff was required to allege class-based,

invidiously discriminatory animus, see, e.g., *Hahn v. Sargent*, 523 F.2d 461,469 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976); divorced fathers seeking custody of their children do not form a protected class under § 1985. No Sixth Amendment right to counsel obtains in civil proceedings of this nature. See, e.g., *Wilson v. State of New Hampshire*, 18 F.3d 40, 41 (1st Cir. 1994)(per curiam). Unauthorized conduct that cannot be foreseen and controlled does not constitute a due process violation "until and unless [the state] ... refuses to provide a suitable post-deprivation remedy," *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); no such showing has been made here. With respect to those claims that were or could have been presented in state court, relitigation thereof would be barred on preclusion grounds. See, *e.g.*, *Willhauck v. Halpin*, 953 F.2d 689, 705 (1st Cir. 1991). The judicial defendants would be immune from most if not all of the damage claims here presented. See, *e.g.*, *Mireless v. Waco*, 502 U.S. 9 (1991)(per curiam). And the Commonwealth and the probate court (along with the private defendants in their official capacities) are not "persons" within the meaning of 42. U.S.C. § 1983. See, *e.g.*, *Hafer v. Melo*, 502 U.S. 21, 25-26 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 62-70 (1989).

Affirmed.

United States Court of Appeals
For the First Circuit
No. 94-2248

Frank A. Greco, M.D., Ph.D.,
Plaintiff, Appellant,
v.
Mary C. Fitzpatrick, et al.,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before
Torruella, Chief Judge,
Selya, Cyr, Boudin, Stahl, and Lynch,
Circuit Judges

ORDER OF COURT
Entered August 15, 1995

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority thereof not having voted to rehear the case en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.
By the Court: Francis P Scigliano, Clerk
cc: Mr. Greco and Ms. McIntyre